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No. 82-258

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF MICHIGAN

PETITIONER,

V.

DAVID KERK LONG,

RESPONDENT,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

# BRIEF OF PETITIONER

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## QUESTIONS PRESENTED

### I.

**WHETHER POLICE OFFICERS AT A TRAFFIC STOP ACTED UNREASONABLY UNDER TERRY v OHIO AND US CONST, AM IV IN LIFTING THE FRONT SEAT CENTER ARMREST OF DEFENDANT'S CAR TO INVESTIGATE THE "LEATHER" ARTICLE PROTRUDING THEREUNDER (VISIBLE FROM OUTSIDE THE CAR), AFTER THEY SEIZED A FOLDING HUNTING KNIFE FROM THE CAR FLOORBOARD (VISIBLE FROM OUTSIDE THE CAR) WHEN THE POLICE WERE CONTINUING THEIR INVESTIGATION TO DETERMINE IF THE DISORIENTED DEFENDANT WOULD BE PERMITTED TO RE-ENTER THE VEHICLE TO OBTAIN THE VEHICLE REGISTRATION OR WHETHER THE DEFENDANT WOULD BE ARRESTED?**

### II

**WHETHER THE SEIZURE OF 75 POUNDS OF MARIJUANA FROM THE TRUNK OF DEFENDANT'S IMPOUNDED CAR FOLLOWING HIS ARREST VIOLATED SOUTH DAKOTA v OPPERMAN OR WAS THE "FRUIT" OF THE ILLEGAL ARMREST "SEARCH" PER WONG SUN v UNITED STATES?**

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## OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 413 Mich 461; 320 NW2d 866 (1982). The Michigan Court of Appeals' opinion is reported at *People* v *Long*, 94 Mich App 338; 288 NW2d 629 (1979).

## JURISDICTION

The opinion of the Michigan Supreme Court was issued June 14, 1982, and the jurisdiction of this court is invoked under 28 USC 1257(3). The petition for a writ of certiorari was filed within the time prescribed in Supreme Court Rule 20.1, and the writ was granted in an order entered October 12, 1982.

## CONSTITUTIONAL PROVISIONS INVOLVED

US Const, Am IV:

> "The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Mich Const 1963, art 1, § 11:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceedings any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

No. 82-256

IN THE SUPREME COURT OF THE UNITED STATES
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V.

DAVID KERK LONG,
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# BRIEF OF PETITIONER

## STATEMENT OF CASE

Just after 12 midnight of August 24-25, 1977, Deputy Howell and Deputy Lewis of the Barry County Sheriff Department clocked a car speeding past them in the opposite direction. By radar the car was hitting 71 miles an hour. (J.A. 11a, 56a, 76a, 119a). The deputies pursued the car without flashers, then lost it, then saw it make a left turn, and proceed down the side road, then swerve, then stop. (J.A. 11a, 23a, 47a, 77a, 108a). When the deputies arrived on the scene, the Mercury sedan was jammed into a ditch and sat broadside on the highway. (J.A. 11a, 14a, 56a, 78a, 116a). David Long, the driver and sole occupant, still sat behind the wheel. (J.A. 11a, 47a, 78a, 108a).

As the deputies approached the car, the driver got out of the Mercury, left his door wide open, and met the deputies

at the rear of the Mercury. (J.A. 11a, 12a, 24a). Deputy Howell asked for a driver's license. The driver just stared and made no response. (J.A. 11a, 24a, 48a, 79a). Howell asked again. The driver waited a few seconds then produced a license. Howell asked for a registration and proof of insurance. No movement, no response. Then, without a word, the driver turned and walked back to his opened door. (J.A. 11a, 26a, 48a, 56a, 79a, 91a, 110a). Howell formed an opinion that defendant "appeared to be under the influence of something" (J.A. 25a). Howell felt that the driver "acted scared," not so much from the traffic stop but similar to when "they have open intox in the car or something like that." (J.A. 25a, 119a). Deputy Howell refused to describe defendant as "passive." (J.A. 25a). The deputies followed the defendant.

As they all approached the opened door, both deputies saw a large folded knife lying on the driver's floorboard in front of the seat near the open door. (J.A. 12a, 26a, 27a, 49a, 57a, 79a). The defendant was told to "hold it" and put his hands on the roof. Howell frisked the defendant for weapons, while Lewis retrieved the weapon (Exhibit 1) (J.A. 12a, 29a, 49a-50a, 80a). The weapon was a large folding Browning knife. (J.A. 12a). [Photographs of Exhibit 1 were filed with the Supreme Court in a motion to expand the record. See GCR 1963, 812.4, 862. The knife has a 4" blade and when fully extended, the weapon is approximately 9" in length.]

The deputy said after seizing the knife that the driver was not under arrest but was "not free to leave" because the deputy "still wanted to talk to him." (J.A. 30a).

Deputy Howell then shined his flashlight into the front seat area of the car to search for further weapons (J.A. 13a, 33a, 35a, 52a, 81a, 100a). Deputy Howell testified that he was not going to let defendant go to the car door after seeing and seizing the

knife from defendant's car (J.A. 32a, 54a). In the light of his flashlight, Howell saw something leather-like sticking out under the folded down dual front seat armrest. (J.A. 13a, 57a, 82a, 94a, 100a). Aside from some papers on the floor area, nothing else appeared in the front seat area. (J.A. 26a). Howell kneeled in the vehicle, raised the driver-side armrest and, with his flashlight saw an open leather pouch. (J.A. 13a, 57a, 83a). The pouch was large enough to hold a weapon in it. (J.A. 36a). Before touching it Howell saw a clear plastic baggie protruding from one side of the open pouch containing a grass-like material. (J.A. 13a, 36a, 37a, 101a). The material appeared to Howell to be marijuana. (J.A. 13a, 83a). Howell removed the pouch and baggie, showed it to Lewis and both confirmed it as being marijuana. (J.A. 84a). Feeling a solid object in the pouch (J.A. 13a), the deputy determined that the pouch also contained a bottle filled with white powder, a tin foil wrapped pill and a package of roll-your-own cigarette papers. (J.A. 13a, 14a, 37a, 38a).

Defendant was arrested for Possession of Marijuana (J.A. 14a, 39a, 84a) and the decision to impound the car was made (J.A. 14a, 57a, 85a). Then, the car interior was searched again for additional contraband, and the glove box for any vehicle registration. (J.A. 14a). No contraband or registration were found. A title for the 1972 Mercury was found in the glove box. (J.A. 14). Outside the car, Deputy Howell asked defendant for the key, having noticed that the key was missing from the ignition. (J.A. 14a). Defendant handed over a single key. When asked for the trunk key, defendant stated "I have no key." (J.A. 15a, 57a, 86a, 100a).

After deciding to impound the car, and pursuant to his "standard policy" to check for valuables, (J.A. 15a, 16a), and further contraband, (J.A. 17a, 86a), Deputy Howell walked around the car and observed that the trunk lock "had been punched out," leaving a hole. (J.A. 16a). Two handprints

were evident on the trunk lid "in the dust." (J.A. 86a). Inserting his own pocketknife into the hole, Deputy Howell tripped the latch and raised the lid. (J.A. 16a, 86a). In the trunk, two large bags with a split in both, were seen to contain marijuana. (J.A. 19a, 40a, 115a). Defendant was then handcuffed, placed in the cruiser, and transported along with the towed car to the sheriff's department. (J.A. 20a). The trunk bags weighed about 75 pounds total. (J.A. 89a).

Following his arraignment, a preliminary examination was held on September 22, 1977. (J.A. 1a). Defendant was bound over on, among other things, Possession with Intent to Deliver. (J.A. 60a). An Information charging Possession with Intent to Deliver Marijuana was filed (J.A. 60a) and a Motion to Suppress was made (and denied, on April 28, 1978, J.A. 62a-65a). Another Motion to Suppress was made on August 28, 1978, (J.A. 70a), and denied (J.A. 73a). Various motions were made in limine (J.A. 65a-70a). Two pretrial hearings were held. (J.A. 62a-65a). A pretrial Motion to Suppress was heard and denied (J.A. 70a-74a). Jury trial commenced on August 28, 1978, and the charge of Possession of Marijuana with Intent to Deliver was reduced to Possession of Marijuana following an improper opening statement by the prosecutor. (J.A. 74a). A motion was made to exclude the seized contraband at trial after the prosecutor rested, and was denied (J.A. 122a-124a). A motion for a directed verdict was made and denied. (J.A. 125a-127a).

Defendant was convicted of Possession on August 29, 1978, following an hour's deliberation by the Jury. Defendant was placed on a two year probation and fined approximately $1,000. (J.A. 129a).

Defendant appealed. The Court of Appeals affirmed defendant's conviction at 94 Mich App 338; 288 NW2d 629 (1979). Leave was granted by the Supreme Court on July 15,

1980, and the parties were "directed to include among the issues to be briefed whether the marijuana found in the automobile driven by defendant should have been suppressed as the product of an illegal search."

The Michigan Supreme Court reversed the conviction at *People* v *Long*, 413 Mich 461; 320 NW2d 866 (1982).

The Attorney General for the State of Michigan filed a petition for writ of certiorari which was docketed in this Court on August 13, 1982. On October 12, 1982, the petition for writ of certiorari was granted.

## SUMMARY OF ARGUMENT

Defendant, David Long, speeding and being pursued by Sheriff's deputies on a lonely county road late at night, jammed his car into a roadside ditch. David Long, who was the driver and sole occupant met the approaching deputies outside his car. During the investigation by the deputies, the disoriented defendant-driver failed to produce proper vehicle identification, and led the deputies back to defendant's open car door. At the open door of defendant's car, one deputy stopped defendant when he saw and seized a knife from the car floorboard; the other deputy frisked the defendant. The deputies were very concerned about more weapons in the car. Before letting defendant re-enter the car to get the needed identification, one deputy flashed his flashlight over the defendant's front seat and saw a leather object under the folded down center armrest. The deputy kneeled in the seat and flipped up the armrest and in the light of his flashlight saw an open pouch big enough to hold another weapon. Protruding from the pouch was a plastic bag containing grass-like material. In the light of his flashlight and without touching the bag, the deputy believed the grass-like material was marijuana. The pouch was

seized, and defendant was arrested for possessing marijuana; defendant's car was impounded. While waiting for the tow truck, one deputy raised the lock-less trunk lid and saw and seized the two large open plastic garbage bags containing approximately 75 lbs of marijuana.

The "armrest" frisk in this case (*People* v *David Long*, 413 Mich 461; 320 NW2d 866 (1982)) did not violate *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) or the Fourth Amendment during this valid investigation where the deputies were reasonably concerned about more weapons being in the car.

*Terry*, noting the large number of police deaths in the United States in the line of duty, found it unreasonable to prevent police officers from taking those measures necessary to neutralize the threat of physical harm when investigating suspicious persons or circumstances where weapons are reasonably suspected (or in fact exist, as in this case).

The *Terry* rationale applies where probable cause may not yet exist, but a reasonable suspicion persists that the present situation is dangerous.

The scope of the *Terry* "frisk," left for future case development, was limited to the justification for the need for the frisk. In this case, the armrest frisk met the scope of the Terry rationale; *i.e.*, "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officers." *Terry* v *Ohio*, 392 US at 29.

Although *Terry* did not arise in a case involving an automobile, *Terry* was applied in an automobile context in *Adams* v *Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972). There, this Court upheld the *Terry* "frisk" of a driver seated

behind the wheel of a stationary vehicle. The frisk in *Adams* reasonably escalated into a justifiable search of defendant's car as part of the automobile exception cases, *Carroll* v *United States*, 267 US 132; 45 S Ct 280; 69 L Ed 543 (1925) and *Brinegar* v *United States*, 338 US 160; 69 S Ct 1302; 93 L Ed 1879 (1949).

*Pennsylvania* v *Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977) correctly applied the *Terry* rationale to a situation involving a traffic stop where the driver was ordered out of the car—for the officer's safety. *Pennsylvania* v *Mimms* could not and did not ignore the police death statistics in traffic stop situations, and held that a *Terry*-type protective frisk was a *de minimis* intrusion of a Fourth Amendment right when balanced against a police officer's perceived need to protect himself.

The initial stop and investigation by the deputies in this case was never contested. The armrest frisk was less intrusive to defendant then a frisk of his person.

Numerous federal and state cases have upheld the limited frisk of automobiles for weapons in *Terry*-type investigations involving automobiles. Given the limited expectation of privacy in automobiles, and the ongoing investigation in this case, the armrest frisk here was no more extensive than was necessary to disclose any weapon reasonably suspected of being hidden under it.

The Fourth Amendment does not require that investigating officers defer protective measures to the point of peril, when reasonable grounds exist for believing, that their safety requires a frisk.

In *Canal Zone* v *Bender*, 573 F2d 1329 (CA 5, 1978), the appeals court believed that the need for a *Terry* protective

frisk of an automobile is dissipated when the suspects are outside the car surrounded by police. However, *Canal Zone* ignores the danger to investigating officers where no arrest is made but the investigation is ongoing and one weapon was already seen and seized, and the defendant may be allowed to re-enter his vehicle to obtain further identification. In this short span of time, under these circumstances, the deputy here reasonably frisked the front armrest of defendant's car. Other state and federal cases, dealing with automobile frisks where the suspect(s) were outside the car, would uphold the armrest search.

The Michigan Supreme Court's decision below by adopting the reasoning of *Canal Zone* v *Bender*, applied the *Terry* rationale too narrowly and should be reversed.

The search and seizure of the 75 lbs. of marijuana from defendant's trunk following the valid impoundment of the car was a proper inventory search under *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092, 49 L Ed 2d 1000 (1976).

Although the Michigan Supreme Court did not address the validity of the inventory search of the trunk, one partially dissenting justice did, and found the trunk search invalid as factually distinguishable from *South Dakota* v *Opperman; i.e.*, no standard procedure exists in the Barry County Sheriff's Department for conducting inventory searches, and the parking lot for impounded cars in Barry County was secure.

*South Dakota* v *Opperman* considered the *standard procedures* rationale in *Cady* v *Dombrowski*, 413 US 433; 37 L Ed 2d 706; 93 S Ct 2523 (1973) as only "a factor tending to ensure" that an inventory was as limited as necessary to fulfill the caretaking function of the police. Petitioner believes, however, that the raising of the lockless trunk lid must have

comported with any "standard procedure for inventory searches" adopted by police agencies and approved by courts around the country. The lower courts in Michigan uniformly approved of the inventory search in this case.

In addition, on the facts in this record, this Court may find probable cause to search the trunk under the teaching of *United States* v *Ross*, .... US ....; 102 S Ct 2157; 72 L Ed 2d 572 (31 Cr L 3051, June 1, 1982) and *Michigan* v *Thomas*, .... US ....; 102 S Ct 3079; 73 L Ed 2d 750 (31 Cr L 4103, June 30, 1982).

Finally, *Wong Sun* v *United States*, 371 US 471; 88 S Ct 407; 9 L Ed 2d 441 (1963), relied on by the Michigan Supreme Court to suppress the marijuana seized from the car trunk was misapplied, if the seizure of marijuana from inside the car as a result of the "armrest frisk" was reasonable, and defendant's arrest for possession of marijuana was appropriate.

## ARGUMENT

### I.

**POLICE OFFICERS AT A TRAFFIC STOP DID NOT ACT UNREASONABLY UNDER TERRY V OHIO AND US CONST, AM IV IN LIFTING THE FRONT SEAT CENTER ARMREST OF DEFENDANT'S CAR TO INVESTIGATE THE "LEATHER" ARTICLE PROTRUDING THEREUNDER (VISIBLE FROM OUTSIDE THE CAR), AFTER THEY SEIZED A FOLDING HUNTING KNIFE FROM THE CAR FLOORBOARD (VISIBLE FROM OUTSIDE THE CAR) AND THE POLICE WERE CONTINUING THEIR INVESTIGATION TO DETERMINE IF THE DISORIENTED DEFENDANT WOULD BE PER-**

**MITTED TO RE-ENTER THE VEHICLE TO OBTAIN THE VEHICLE REGISTRATION OR WHETHER THE DEFENDANT WOULD BE ARRESTED.**

Defendant was speeding and jammed his car into a roadside ditch. The pursuing sheriff deputies stopped their cruiser and met defendant at the back of his immobilized car. Defendant failed to produce the proper identification and, without uttering a word, walked back to his opened car door. Defendant appeared to be "on something" in the opinion of the deputies. The two deputies followed the defendant to his car and saw a knife on the floor of defendant's car. This weapon, visible from outside the automobile, was seized from the car. Defendant was then frisked, producing nothing. One deputy standing by the open door shined a flashlight on the front seat of defendant's car to look for more weapons, before letting defendant re-enter the auto to get further identification. Seeing something protruding from under the folded down center armrest, one deputy knelt on the front seat, flipped up the armrest and saw a baggie of marijuana under it. Defendant was arrested for possession of marijuana. In *People* v *Long*, 413 Mich 461; 320 NW2d 866 (1982), the Michigan Supreme Court erroneously held the armrest frisk to be invalid under *Terry* v *Ohio*, 392 US 1; 20 L Ed 2d 889; 88 S Ct 1868 (1968).

After seizing defendant's knife from the floorboard, the warrantless frisk of the front seat area of defendant's car following the pat down of his person, did not violate *Terry* v *Ohio* or the Fourth Amendment. In *Terry*, the United States Supreme Court, noting the large number of deaths of police officers in the United States in the line of duty, particularly with guns and knives, reasoned:

> "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the offi-

cer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."

*Terry* v *Ohio, supra,* 392 US at 24

See also *Adams* v *Williams, supra,* 407 US at 148, fn 3; *United States* v *White,* 648 F2d 29, 35, fn 29, 37, fn 38 and fn 39 (CA DC, 1981). In defining the *Terry* "stop and frisk" rationale, the United States Supreme Court said:

"Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. *Beck* v *Ohio,* 379 US 89, 91, 13 L Ed 2d 142, 145, 85 S Ct 223 (1964); *Brinegar* v *United States,* 338 US 160, 174-176, 93 L Ed 1879, 1889-1891, 69 S Ct 1302 (1949); *Stacey* v *Emery,* 97 US 642, 645, 24 L Ed 1035, 1036 (1878). And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. *Brinegar* v *United States supra.*"

*Terry* v *Ohio, supra,* 392 US at 27 (footnote omitted)

This Court found that the evidence seized in *Terry* "was discovered by means of a seizure and search which were . . . reasonably related in scope to the justification for [its] initiation." 392 US at 29. In applying the "stop and frisk" rule to other cases, this Court said:

> "We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See *Sibron* v *New York*, 392 US 40, 20 L Ed 2d 917, 88 S Ct 1889. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See *Preston* v *United States*, 376 US 364, 367, 11 L Ed 2d 777, 780, 84 S Ct 881 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.
>
> "The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surface of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He

> did not conduct a general exploratory search for whatever evidence of criminal activity he might find."
>
> *Terry* v *Ohio*, *supra*, 392 US at 29-30

*Terry* v *Ohio* did not arise in an automobile context.

In *Adams* v *Williams*, *supra*, the Court applied *Terry* v *Ohio* to uphold the warrantless search and seizure of a weapon from defendant's waistband as defendant sat behind the wheel of his stationary automobile. Defendant was arrested for possessing the gun. A search of defendant's person revealed heroin in defendant's pocket, followed by a car search revealing more weapons in his car.[1] In *Adams*, the informant's tip telling the police about the gun, though perhaps insufficient to establish probable cause, for purposes of a search warrant or arrest, was sufficient for a *Terry* "stop and frisk." The Court, agreeing that the investigating officer had ample reason to fear for his safety based on this tip, said:

> "So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." (footnote omitted)
>
> *Adams* v *Williams*, *supra*, 407 US at 146

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[1]

In *Adams* v *Williams*, the subsequent warrantless search of defendant's car as incident to defendant's arrest for possession of the gun and heroin was reasonable, based on probable cause for such a car search under the *Carroll* v *United States*, 267 US 132; 69 L Ed 543; 45 S Ct 280 (1925) and *Brinegar* v *United States*, 338 US 160; 93 L Ed 1879; 69 S Ct 1302 (1949) automobile exception.

The court below in *Williams* v *Adams*, 441 F2d 394 (CA 2, 1971) found no probable cause for the waistband, pocket, or the car search and had ordered the evidence suppressed.

In the instant case, the officers saw and seized one weapon from the car during a valid stop. Before letting defendant re-enter the same car to get his vehicle identification, the frisk of the front seat area including the raising of the armrest to determine the nature of the leather object seen under the armrest from outside the car was reasonable under the *Terry* rationale (*i.e.*, protection of the officers and others nearby) and consistent with *Terry* as applied in *Adams* v *Williams*. *Accord, United States* v *Thomas*, 314 A 2d 464 (DC App, 1974).

Here, the deputies seeing and seizing one weapon were clearly worried about other weapons in the car. One deputy agreed that he was not going to let defendant go to the car after seeing and seizing the knife from the car.

In *Pennsylvania* v *Mimms*, 434 US 106; 54 L Ed 2d 331; 98 S Ct 330 (1977), the application of *Terry* v *Ohio* in a traffic stop situation to justify a police command to the occupants to leave the vehicle was accepted as "too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty." There the Court recognized:

> ". . . the inordinate risk confronting an officer as he approaches a person seated in an automobile. • • • We are aware that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. *United States* v *Robinson*, 414 US 213, 234, 38 L Ed 427, 94 S Ct 467, 66 Ohio Ops 2d 202 (1973). Indeed, it appears 'that a significant percentage of murders of police officers occurs when the officers are making traffic stops.' Id., at 234 n 5, 38 L Ed 2d 427, 94 S Ct 467, 66 Ohio Ops 2d 202."
>
> *Pennsylvania* v *Mimms, supra*, 434 US at 110.

After Mimms was ordered out of his car, the "bulge" under Mimms' coat was frisked and the weapon thereunder was seized and this Court held that the action taken was appropriate under the *Terry* standard. "In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat down.'" 434 US at 112.

The traffic stop in the instant case was never contested below. The propriety of the police investigating the immobilized car was never questioned either.

Given the valid stop and investigation by the police of a strangely behaving driver who stuck his car in a ditch and who could not produce proper vehicle documents, the sight of the knife in defendant's car only heightened the danger of the situation in the minds of these deputies. After seeing and seizing the knife, one deputy then immediately *patted defendant down*. But, before letting defendant re-enter the car to obtain further identification, the deputy shined his flashlight onto the front seat and saw a "leather-like" article under the armrest. The deputy "frisked" the front seat area of defendant's car by flipping up the armrest. Under these circumstances, and given the limited expectation of privacy in automobiles,[2] this *de minimis* intrusion under the armrest of a stopped vehicle under investigation, like frisking the bulge in a coat, is an insignificant invasion of a defendant's personal security when balanced against the legitimate concerns of the People for the officer's safety. *Pennsylvania* v *Mimms*, *supra*, 434 US at 109, 111. Indeed, the frisk of a bulge in clothing is *more* personally intrusive than flipping up an armrest to investigate for additional weapons where one weapon was clearly seen on the floorboard.

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[2]

*Cf.*, *South Dakota* v *Opperman*, 428 US 364, 367-368; 49 L Ed 2d 1000, 1004; 96 S Ct 3092 (1976).

In this case, as in *Brown* v *State*, 358 So 2d 596, 601 (Fla App, 1978):

> "The search was limited to a manner no more extensive then was necessary to disclose any weapon hidden under the armrest. Consequently, the search under the armrest fell within the scope of a protective search. The police officer acted reasonably in his search under the armrest. Accord, *Commonwealth* v *Almeida*, 366 NE 2d 756 (Mass, 1977)."
>
> *Brown* v *State*, 358 So 2d 596, 601

*Accord, State* v *Darling*, 393 A 2d 530 (Maine, 1978); *Commonwealth* v *Silva*, 366 Mass 402; 318 NE 2d 895 (1974); *Commonwealth* v *Almeida*, 373 Mass 266; 366 NE2d 756, 760 (1977); *State* v *Brown*, 160 NJ Super 227; 389 A 2d 507 (1978); *State* v *Malbeck*, 15 Wash App 871; 552 P2d 1092 (1976); *United States* v *Thomas, supra, United States* v *Wilkerson*, 598 F2d 621 (CACD, 1978); *United States* v *Rainone*, 586 F2d 1132 (CA 7, 1978), *cert den* 440 US 980; 60 L Ed 2d 239; 99 S Ct 1781 (1979).

In this case, as in other cases where the circumstances in a traffic stop escalate to support a reasonable suspicion by the investigating police that a situation is potentially dangerous to them or to others, the rationale of *Terry*—the protection of the investigating officer and others nearby—permits the officer to make a frisk of the automobile, limited to what is minimally necessary to uncover weapons to which the suspect will have easy access.

> "An officer 'need not defer protection measures to the point of peril. All the law requires is that he have reasonable basis for believing that his safety or the safety of others requires a search or seizure.'"
>
> *United States* v *Green*, 465 F2d 620, 623-624 (CADC, 1972).

Accord, *United States* v *Wilkerson, supra; Commonwealth* v *Almeida, supra; United States* v *Rainone, supra; State* v *Gilchrist*, 299 NW2d 913 (Minn, 1981); *State* v *Luxem*, 324 NW2d 273 (32 CrL 2041, September 8, 1982) [citing and distinguishing *People* v *Long*, 413 Mich 461; 320 NW2d 866; (1982)].

The deputy flipped up the armrest to look for more weapons. He saw the pouch and the plastic baggie sticking out of it containing marijuana. The seizure of the marijuana in the process of checking for more weapons was a happenstance, not a violation of the Fourth Amendment. See *Williams* v *State*, 19 Md App 204, 213; 310 A2d 593 (1973). The scope of the intrusion here was "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry, supra*, 392 US at 29.

In *Terry* stops involving automobiles, it has been held that once a defendant leaves the automobile, the defendant has no access to weapons in the car, thereby posing no danger to the investigating police. *Canal Zone* v *Bender*, 573 F2d 1329 (CA 5, 1978).

*Canal Zone, supra*, does not address the very real danger to the police when suspects who are outside the car are permitted to re-enter the car, while the police are still investigating the encounter with the suspect, or where the suspects are not detained or arrested but are released to re-enter their car and drive away. In such instances where danger to the investigating police exists (one weapon seen in defendant's car, another possible weapon exists under the armrest) and where defendant has not yet been arrested (and may not be), the courts, dealing with this issue, have upheld a reasonable protective frisk of the car interior. *United States* v *Powless*, 546 F2d 792 (CA 8, 1977), *cert den*, 430 US 910; 97 S Ct 1185; 51 L Ed 2d 588 (1977); *United States* v *Wilkerson, supra;*

*United States* v *Rainone*, (cert den) *supra; State* v *Gilchrist, supra; Commonwealth* v *Almeida, supra; Uptegraft* v *State*, 621 P2d 5 (Alaska, 1980); *United States* v *Green, supra; United States* v *Thomas, supra; State* v *Brown, supra; State* v *Darling, supra; Brown* v *State, supra.*

Petitioner urges the court to permit a protective frisk of that part of defendant's car reasonably accessible to defendant when he seeks to re-enter the vehicle to obtain needed identification in circumstances such as this case where the investigation by the police is still ongoing, and the police reasonably fear for their safety.

The Michigan Supreme Court construued *Terry* v *Ohio* too narrowly, by not giving full effect to the *Terry* rationale—the protection of police officers validly investigating a suspicious driver of an automobile immobilized after a high speed pursuit, under circumstances indicating some peril to the officers or defendant.

## II.

## THE SEIZURE OF 75 POUNDS OF MARIJUANA FROM THE TRUNK OF DEFENDANT'S IMPOUNDED CAR FOLLOWING HIS ARREST DID NOT VIOLATE SOUTH DAKOTA V OPPERMAN AND WAS NOT THE "FRUIT" OF THE ILLEGAL ARMREST SEARCH PER WONG SUN V UNITED STATES.

The validity of the armrest search and the subsequent trunk search following defendant's arrest was raised by argument during defendant's preliminary examination on September 22, 1977, (J.A. 16a-18a). The district judge's written opinion of December 28, 1977, upheld the armrest search as a proper protective search and the trunk search as a valid inventory

search and as a search incident to defendant's valid arrest. Defendant filed a pretrial motion to suppress and to quash based on the invalidity of the searches; this motion was denied by the circuit judge at the April 28, 1979, pretrial hearing. The circuit judge, on independent review, found the armrest and trunk searches reasonable as valid protection and proper inventory. Defendant again raised the search issue during trial by a motion to reconsider the denial of suppression (J.A. 70a-72a) and the trial judge denied reconsideration as unwarranted, holding both searches reasonable and distinguishable from the state and federal cases cited by defendant (J.A. 73a-74a). Towards the close of the prosecution's case, defendant again sought exclusion of the tendered marijuana sample-exhibits as the fruit of the unreasonable auto searches (J.A. 122a-123a). After argument, the trial judge again ruled the auto searches were valid protection and proper inventory (J.A. 124a).

Defendant was convicted of possession of marijuana [MCL 333.7403(2)(d); MSA 14.15(7403)(b)(4)], and the Michigan Court of Appeals, 94 Mich App 338; 288 NW2d 629 (1979) affirmed the conviction, holding both the armrest search valid under *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and the inventory trunk search valid under *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976) and the US Const, Am IV. The Michigan Supreme Court reversed citing US Const, Am IV and Mich Const 1963, art 1, § 11, and holding that *Terry, supra* did not authorize a protective search of an area, and that the trunk search was an illegal "fruit" of an invalid arrest per *Wong Sun* v *United States*, 371 US 471; 88 S Ct 407; 9 L Ed 2d 441 (1963). The dissenting chief justice would affirm the armrest search as proper protection, and the trunk search as proper inventory. Another justice, partially dissenting, would affirm the armrest search as proper protection, but would reverse the inventory trunk search as invalid.

Thus, the validity of the inventory search was never reached by the Michigan Supreme Court majority. One partially dissenting justice did find the inventory search invalid, as factually distinguishable from *South Dakota* v *Opperman*. This justice believed that the impounded car was searched without any inventory search procedures having been established by the Barry County Sheriff's Department, and because a warrantless inventory search was unnecessary, given the secure police parking lot situation in this case.

Petitioner believes that *South Dakota* v *Opperman* does "point the way to the correct resolution of this case." *South Dakota* v *Opperman, supra*, 428 US at 375. In *South Dakota* v *Opperman*, the police properly impounded the unoccupied vehicle for parking violations and saw personal effects in the car, from outside the car. Opperman's locked car was unlocked "at the officer's direction." The officer entered the car, opened the unlocked glove box and seized marijuana found therein. The United States Supreme Court majority, citing several cases including *Cady* v *Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973); *Chambers* v *Maroney*, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970) reh den 400 US 856; *Cooper* v *California*, 386 US 58; 87 S Ct 788; 17 L Ed 2d 730 (1967); and *Harris* v *United States*, 390 US 234; 88 S Ct 992; 19 L Ed 2d 1067 (1968), reasoned:

> "The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable. In the first such case, Mr. Justice Black made plain the nature of the inquiry before us:
>
> " 'But the question here is not whether the search was *authorized* by state law. The question is a rather whether the search was reasonable under the Fourth Amendment.' *Cooper* v *California*, 386 US, at 61, 17 L Ed 2d 730, 87 S Ct 788 (emphasis added)

"And, in his last writing on the Fourth Amendment, Mr. Justice Black said:

"[T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibts only "*unreasonable* searches and seizures." The relevant test *is not the reasonableness of the opportunity to procure a warrant*, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts.' *Coolidge* v *New Hampshire*, 403 US, at 509-510, 29 L Ed 2d 564, 91 S Ct 2022 (concurring and dissenting) (emphasis added)."

*South Dakota* v *Opperman, supra*, 428 US at 372-373.

This Court in *Opperman* rejected the notion that inventory searches applied only to non-criminal settings, noting that in *Cooper* v *California*, the inventory search occurred "in a distinctly criminal setting" (428 US at 373), and that "probable cause to search for contraband in the vehicle had not been established" (428 US at 373).

The Court in *Opperman* also recalled its earlier holding in *Cady* v *Dombrowski* where the inventory search of the impounded car belonging to an off-duty police officer was made based on the "reasonable grounds to believe a weapon might be in the car." There, the inventory search "was incident to the caretaking function of the local police to protect the community's safety." 428 US at 374. The United States Supreme Court found that the *Cady* inventory search was protective and carried out in accordance with standard procedures in the local police department. Significantly, the United States Supreme Court in *Opperman* characterized the *standard procedures* rationale in *Cady* as:

". . . a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."

*South Dakota* v *Opperman, supra,* 428 US at 375

Although a standard departmental procedure for inventory searches did exist in *Opperman,* the United States Supreme Court in *Opperman* put the "standard procedure" rationale of *Cady* into proper perspective by saying:

"As in Cady, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.fn [10]

On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not 'unreasonable' under the Fourth Amendment."

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fn [10]

The inventory was not unreasonable in scope. Respondent's motion to suppress in state court challenged the inventory only as to items inside the car not in plain view. But once the policeman was lawfully inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the car.

The "consent" theory advanced by the dissent rests on the assumption that the inventory is exclusively for the protection of the car owner. It is not. The protection of the municipality and public officers from claims of lost or stolen property and the protection of the public from vandals who might find a firearm, Cady v Dombrowski, or as here, contraband drugs, are also crucial.

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Here, defendant was validly stopped. With one weapon already seen in his car, the front seat of defendant's car was protectively frisked for more weapons. He was arrested for possession of marijuana seized from his car in the course of searching for other weapons. His car was impounded, then inventoried. The inventory search consisted of lifting the trunk lid. The trunk lid had no lock. Surely, lifting an unlockable trunk lid of a validly impounded car comported with "standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts." (See 428 US at 376 quoted above).

Court approval of the "standard police procedure" used here (raising an unlockable trunk lid of a validly impounded car) did occur since the district court, the circuit court, and the Court of Appeals affirmed the inventory search of defendant's trunk as being valid and the Michigan Supreme Court majority never addressed the validity of the inventory search of defendant's trunk.

Given these circumstances (the driver and the sole occupant was speeding and jammed his car into a roadside ditch, the deputies had pursued the speeding car, the driver had a knife and lacked proper identification, the driver appeared disoriented, the driver was arrested for possessing contraband in his car, the car was impounded, the driver had no trunk key and the trunk lid had no lock), the raising of the trunk lid was a reasonable intrusion, limited to the extent necessary for any inventory search, *i.e.*, to protect the police from danger [*Cooper* v *California*, 386 US 58; 87 S Ct 788; 17 L Ed 2d 730 (1967)], to protect defendant's property [*Harris* v *United States*, 390 US 234; 88 S Ct 992; 19 L Ed 2d 1067 (1968)], and to protect the public [*Cady* v *Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973)].

Defendant argued below that the trunk search was an invalid inventory search, and occurred without probable cause. Arguably, the trunk search was based on probable cause which the United States Supreme Court may find "self-evident" in this case as it did in *Colorado* v *Bannister*, 449 US 1; 101 S Ct 42; 66 L Ed 2d 1 (1980). The limited frisk of the car leading to defendant's probable cause arrest for possession of marijuana seized from inside the car could justify the deputy's belief that he could search the entire car including the trunk for more contraband. *United States* v *Ross; supra;* and *Michigan* v *Thomas, supra.*

In *Ross, supra*, the scope of the warrant exception established in *Carroll* v *United States* permitting a warrantless vehicle search based on probable cause, also included the search of the car trunk. This Court said:

> "Moreover, the probable cause determination must be based on objective facts that could justify the issurance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. '"[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable."' *Id.*, at 161-162 (quoting *Director General* v. *Kastenbaum*, 263 U.S. 25, 28)fn [10]

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fn [10]

"After reviewing the relevant authorities at some length, the Court concluded that the probable cause requirement was satisfied in the case before it. The Court held that 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.' *Id.*, at 162. Cf. *Brinegar* v. *United States*, 338 U.S. 160, 176-177; *Henry* v. *United States*, 361 U.S. 98, 102."

"In short, the exception to the warrant requirement established in *Carroll*—the scope of which we consider in this case—applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.

*United States v Ross*, 31 CrL 3054 (Footnotes 11 & 12 omitted)

and further:

"The exception recognized in *Carroll* is unquestionably one that is 'specifically established and well-delineated.' We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. *If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.*"

*United States* v *Ross*, 31 CrL 3058 (emphasis added)

In *Michigan* v *Thomas, supra*, this Court summarily reversed a Michigan Court of Appeals decision. In *Thomas*, the state appeals court held that the properly impounded vehicle (following defendant's arrest for open intoxicants in the car) was subjected to an inventory search that was "unreasonable in scope" ' and further, that the subsequent search of the vehicle air vents, after finding marijuana in the unlocked glove compartment during the inventory search, was invalid as being without "exigent circumstances". (31 CrL 4104). This Court succinctly held:

"We reverse. In *Chambers* v. *Maroney*, 399 U.S. 423 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile

that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas* v. *White*, 423 U.S. 67 (1975). See also *United States* v. *Ross*, ...., U.S. ...., ...., n. 9 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant. See id.

"Here, the Court of Appeals recognized that the officers were justified in conducting an inventory search of the discovery of contraband. Without attempting to refute the State's contention that this discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle, the Court of Appeals held that the absence of 'exigent circumstances' precluded a warrantless search. This holding is plainly inconsistent with our decisions in *Chambers* and *Texas* v *White*.

The petition for certiorari and the motion of respondent to proceed in forma pauperis are granted, the judgment of the Michigan Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion. It is so ordered."

*Michigan* v *Thomas*, 31 CrL 4104

In this case, even without the initial armrest frisk,[3] the valid impoundment and the cusory inventory search of the ditched car[4] was within the scope of the inventory search in *Michigan* v *Thomas*. Such an inventory search would have disclosed the marijuana under the armrest and in the trunk, per *Michigan* v *Thomas*. In this case, if the armrest marijuana was validly seized, the armrest marijuana here (like the glove-box marijuana in *Michigan* v *Thomas*) supplied probable cause for the trunk search here (like the air vent search in *Michigan* v *Thomas*).

The arrest of defendant for possessing marijuana in the car and the impoundment of his car were valid, and the search of defendant's car trunk whether on probable cause, or as a valid protective and caretaking inventory search, was appropriate.

## CONCLUSION

Petitioner asks this Court to reverse the judgment of the Michigan Supreme Court in *People* v *Long*, 413 Mich 461; 320 NW2d 866 (1982) for the reasons given above. Petitioner submits that the "armrest" frisk comported with the scope of the *Terry* v *Ohio* "stop and frisk" rationale, and that the inventory search of the car trunk was reasonable under the Fourth Amendment.

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[3]

Conceivably, defendant could have been arrested *in 1977* for speeding [a misdemeanor per MCL 257.628(d); MSA 9.2328(4)], lack of proper vehicle identification (a possible misdemeanor per MCL 257.215; MSA 9.1915, and MCL 257.223; MSA 9.1923), driving while intoxicated (per MCL 257.625; MSA 9.2325), or reckless driving (a misdemeanor per MCL 257.626; MSA 9.2326).

[4]

Cf., *South Dakota* v *Opperman*, 428 US 364, 368-369; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).